

CIVIL REVISION APPLICATION No 224 of 1995

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

2. To be referred to the Reporter or not? No @@

5. Whether it is to be circulated to the Civil Judge?
No

PRAJAPATI GANDABHAI ATMARAM

MR VC DESAI for Petitioners
MR BR PARIKH for Respondent No. 1
NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 18/09/98

ORAL JUDGEMENT

1. This revision under Section 115 C.P.C. has been filed challenging the order of the lower Appellate Court allowing the Application Ex.5 moved by the plaintiff seeking temporary injunction.

2. Brief facts are that in a suit for permanent injunction application Ex.5 was moved for temporary injunction during pendency of the Suit. After inviting objections and hearing the two sides, viz. plaintiff and the defendant the trial Court dismissed the Application. An Appeal was preferred which was allowed. The Appellate Court allowed the injunction Application and restrained the defendants No.2 & 3 from transferring the property in favour of any person till the decision of Suit.

3. Shri V.C.Desai, learned Counsel for the revisionist states that on information gathered it has been found that no subsequent transfer of property has been made after the order of the Appellate Court.

4. After examining the Judgment of the lower Appellate Court it is found that the question of prima facie case whether the property is joint Hindu family property or personal property of defendants 4 and 5 was decided mainly on admission made by the defendants No.4 & 5 in their written statement. Shri Desai has contended that the defendants No.4 & 5 are in collusion with the plaintiff. He has further contended that the defendants No.4 & 5 had already sold the property on 3.2.1975 whereas the Suit was filed on 15.6.1987. According to his contention in view of Section 18 of the Indian Evidence Act admission made by the defendants No.4 & 5 in their written statement, after cessation of their interest in the property is no admission and could not be relied upon by the Appellate Court. He made reference to Section 18, Sub-clause (2) of the Indian Evidence Act, which provides that statement made by the persons mentioned in Paras : 1 & 2 are admissions, if they are made during continuance of the interest of the person making a statement. The lower Appellate Court has not at all considered whether there was any subsisting interest of the defendants No.4 & 5 in the disputed property on the date of the institution of the Suit, viz. on 15.6.1987, especially when they had allegedly sold the

property on 3.2.1975. The lower Appellate Court was guided mainly on this admission of these defendants. Since there is definite allegation of collusion between these defendants and the plaintiff and there is further allegation that these defendants had no subsisting interest in the property their admission could not be considered by the lower Appellate Court. It has further been argued that other documents on record were not considered by the lower Appellate Court. The Judgment of the lower Appellate Court confirms this submission of the learned Counsel for the revisionist.

5. It is, therefore, a case where upon improper consideration of admission of the defendants No.4 & 5 and non-consideration of material on record the lower Appellate Court has reversed the order of the trial Court. It has, therefore, committed manifest illegality and jurisdictional error. It is also a case which can be said to be falling within the category of improper exercise of jurisdiction. The order under revision has therefore to be set aside and the Appeal has to be remanded to the lower Appellate Court for fresh disposal. The revision, therefore, succeeds and is hereby allowed. The order of the lower Appellate Court which is under revision is set aside. Civil Miscellaneous Appeal No.230/93 is remanded to the lower Appellate Court with direction to decide the same afresh after hearing arguments of the appellant and the respondent's Counsel and considering the entire material on record and in accordance with law.

6. It is informed by the learned Counsel for the respondent that the main Suit is listed for final hearing in the trial Court on 8.10.1996. The final hearing of the Suit in the trial Court will therefore proceed.

7. The Appellate Court shall examine from the record whether during pendency of the Appeal any interim order was passed and was subsisting till the impugned order was passed. If any such interim order was subsisting it may be continued during pendency of the remanded Appeal, otherwise suitable order may be passed. No order as to costs.

sd/-

Date : 18.09.1998 (D. C. Srivastava, J.)

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